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IN THE
COURT OF APPEALS OF INDIANA

JOSEPH SELLERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A03-0712-CR-555
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0611-FC-157

June 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Joseph Sellers appeals his sentence following his conviction for Child Molesting, as a Class C felony, pursuant to a plea agreement. Sellers presents two issues for review, namely:

1. Whether his sentence is inappropriate in light of the nature of the offense and his character.

2. Whether the trial court lacked authority to allow Sellers to petition for a modification of sentence after two years, thus rendering the entire sentence invalid.

We affirm.

FACTS AND PROCEDURAL HISTORY

Between May 1, 2001, and October 31, 2004, Sellers was acquainted with the family of F.S., who was less than fourteen years old during that time.[1] Sellers occasionally helped the family financially. During that time, Sellers molested F.S., fondling her breasts and vaginal area while she sat on his lap.

On September 13, 2006, the State charged Sellers with child molesting, as a Class C felony. After his arrest, Sellers was released on bond. He agreed to be on predispositional probation and to participate in sex offender counseling. Sellers was compliant throughout the period of predispositional probation.

At a hearing on January 4, 2007, Sellers pleaded guilty under an open plea agreement. On October 5, 2007, the trial court heard argument on sentencing. In its sentencing order, the court made the following observations:

[1] The record is inconsistent with regard to F.S.'s exact age when the incidents at issue occurred. In the sentencing order, the trial court found that F.S. was between nine and thirteen years old, and Sellers does not challenge that finding.

> The Defendant, Joseph Sellers, is seventy-seven years old. He has no criminal history and worked steadily until his retirement. He plead[ed] guilty to the offense, saving the expense and time of conducting a trial. The Defendant has publicly expressed his remorse. He was on predispositional probation for one year and during this time was compliant with the rules of probation. A psychosexual evaluation was completed on the Defendant. The evaluator concluded that Defendant is at a low risk to re-offend.
>
> The evidence reveals that this was not an isolated event. Defendant molested the victim over a period of time. The victim was between nine and thirteen years old and the Defendant was in his seventies. Defendant was in a position of influence with the family and in a position of trust with the victim. Defendant groomed his victim and molested her under the guise of "playing around." This behavior was egregious both to the victim and the community.

Appellant's App. at 36. The court then sentenced Sellers to six years in the Department of Correction with two years suspended. The sentencing order also provides that Sellers "may file a petition for modification of his sentence after serving two (2) years." Id. at 37. Sellers now appeals.

DISCUSSION AND DECISION[2]

Issue One: Appellate Rule 7(B)

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848

[2] Sellers has included a complete copy of the transcript in his appendix. This practice not only violates Indiana Appellate Rule 50(A)(g), which instructs appellants to include "brief portions of the Transcript . . . that are important to a consideration of the issues raised on appeal," but results in an unwieldy file. (Emphasis added.) We urge Sellers' counsel to abide by this important rule in the future. We also observe that the first page is missing from Sellers' brief. According to the brief's table of contents, page 1 contains the Statement of Issues Presented for Review, which are restated elsewhere in the brief. Thus, it was not necessary to require Sellers to submit an amended brief.

N.E.2d 1073, 1080 (Ind. 2006)), (alteration original), clarified in part on other grounds, 875 N.E.2d 218 (Ind. 2007). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Sellers contends that his sentence is inappropriate in light of the nature of the offense and his character.[3] Specifically, he argues that the sentence imposed above the advisory sentence is inappropriate because "maximum sentences are reserved [for] the very worst offenses and the very worst offenders." Appellant's Brief at 5 (citation omitted). But the trial court did not impose the maximum sentence. The advisory sentence for a Class C felony is four years, the maximum sentence is eight years, and the trial court sentenced Sellers to six years. See Ind. Code § 35-50-2-6. Thus, Sellers' contention is without merit.

Nor is Sellers' sentence inappropriate in light of the nature of the offense. Sellers molested a girl multiple times when she was between nine to thirteen years old and he was in his seventies. The trial court found that he was "in a position of influence over the

[3] Sellers states that he seeks review of his sentence under Appellate Rule 7(B). But he does not make specific arguments regarding the nature of the offense or his character. Thus, we incorporate Sellers' particular arguments into our Rule 7(B) analysis.

family" and in a position of trust with his victim. Appellant's App. at 36. The court further found that Sellers "groomed his victim and molested her under the guise of 'playing around.'" Id. Sellers does not challenge any of the court's findings regarding the nature of the offense and, therefore, has not shown that his sentence is inappropriate in light of that factor.

Sellers also has not demonstrated that his sentence is inappropriate in light of his character. Sellers was in his seventies when he molested S.F., a child less than fourteen years old. Again, he was in a position of influence over the family and in a position of trust with S.F. The trial court found that such behavior was "egregious both to the victim and to [the] community." Appellant's App. at 36. Sellers' six-year sentence is not inappropriate in light of his character.

Sellers argues that his "overall good nature was misinterpreted as an attempt to gain influence over the victim's family" and that his "good nature should not be used to outweigh the numerous mitigating circumstances." Appellant's Brief at 6. But the weight accorded to an aggravator or mitigator is not available for appellate review. Anglemyer, 868 N.E.2d at 493-94. Thus, this contention must fail.

Sellers also observes that the trial court "acknowledge[d] the majority of [the] mitigating circumstances [but] afforded them little, if any, weight." Appellant's Brief at 5. But because Sellers does not support that statement with further reasoning, he has waived any issue regarding the mitigators. See Ind. Appellate Rule 46(A)(8)(a). And to the extent Sellers is arguing that the trial court improperly weighed those mitigating

factors, again, that claim is not available for appellate review. See Anglemyer, 868 N.E.2d at 493-94.

Issue Two: Validity of Sentence

Sellers next contends that his sentence is invalid because the trial court was without the authority to offer him an opportunity to petition for modification of his sentence after two years.[4] In support, he cites to Indiana Code Section 35-38-1-17, which provides, in relevant part:

> (a) Within three hundred sixty-five (365) days after:
>
> (1) a convicted person begins serving the sentence imposed on the person;
>
> (2) a hearing is held:
>
> (A) at which the convicted person is present; and
>
> (B) of which the prosecuting attorney has been notified; and
>
> (3) the court obtains a report from the department of correction concerning the convicted person's conduct while imprisoned;
>
> the court may reduce or suspend the sentence. . . .
>
> (b) If more than three hundred sixty-five (365) days have elapsed since the convicted person began serving the sentence and after a hearing at which the convicted person is present, the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney. . . .

Sellers also cites to State v. Fulkrod, 753 N.E.2d 630, 633 (Ind. 2001), where the trial court in its sentencing order reserved the right to modify the defendant's sentence. Our

[4] The State contends that Sellers' argument "has nothing to do with the sentence imposed," that Sellers is actually challenging his guilty plea, and that such an issue is not available for review on direct appeal. But Sellers does not make any argument regarding the validity of his guilty plea. We find Sellers' argument to be properly before us on direct appeal as a challenge to the validity of his sentence.

supreme court reversed the subsequent modification of sentence, holding that the sentencing judge could not "circumvent the plain provisions in the sentence modification statute simply by declaring that he or she reserves the right to change the sentence at any future time." Id. at 633.

The sentence modification statute and Fulkrod address a court's authority to modify a sentence, not a defendant's right to petition for that modification. Here, the sentencing order provides that Sellers "may file a petition for modification of his sentence after serving two (2) years, if he presents proof that his conduct record during his period of incarceration is without blemish and without disciplinary action of any kind." Appellant's App. at 37 (emphasis added). The court did not reserve the right to modify Sellers' sentence. Instead, the court merely informed Sellers that he may petition for modification of his sentence after two years. Such a provision does not run afoul of the sentence modification statute or Fulkrod. Thus, Sellers' arguments that that provision in the sentencing order is illusory and that his sentence is illegal are without merit.

Affirmed.

DARDEN, J., and BROWN, J., concur.